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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

ESVIN FERNANDO ARREDONDO
RODRIGUEZ INDIVIDUALLY AND
A.F.A.J., A MINOR, BY HER GUARDIAN
AD LITEM, JEFFREY HAMILTON,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

Case No.: CV 22-02845-JLS-AFM

**PLAINTIFFS' SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
MOTION FOR DOCUMENT
PRODUCTION AND ENTRY OF
PROTECTIVE ORDER**

Hon. Alexander F. MacKinnon

1 On April 11, 2023, the Court held a hearing on Plaintiffs' Motion for Document
2 Production and Entry of Protection Order. ECF No. 45. At that hearing, the Court
3 indicated that it was inclined to implement the Court's model protective order with
4 language providing an interim period of time during which Plaintiffs would maintain the
5 confidentiality of Defendant's document productions, and during which Defendant would
6 be ordered to conduct the particularized review required under Federal Rule of Civil
7 Procedure 26(c) and controlling Ninth Circuit precedent. The Court gave Defendant the
8 opportunity to file a supplemental brief identifying any cases in which courts approved a
9 protective order like that suggested by Defendant, over the objection of the opponent, and
10 in which the courts engaged in discussion and analysis. Defendant filed its supplemental
11 brief on April 18, 2023. ECF No. 53. Pursuant to this Court's direction, Plaintiffs file
12 this supplemental brief.

13 **I. DEFENDANT'S SUPPLEMENTAL BRIEF FAILED TO ADHERE TO**
14 **THIS COURT'S INSTRUCTIONS**

15 Despite this Court's clear instructions limiting the scope of the supplemental
16 briefing, Defendant's brief does precisely what the Court cautioned it not to do. The
17 Court expressly limited supplemental briefs to the issue of Defendant's proposed mass
18 designations of confidentiality. The Court further instructed Defendant to cite cases that
19 involve contested protective orders, where (1) a court permitted a party to use mass
20 confidentiality designations without regard for the content of specific documents, over
21 objection; and (2) the court explained the legal support for such a deviation from the law
22 in this Circuit. Instead, Defendant dedicated all but two paragraphs of its brief to
23 arguments that the Court already rejected at the hearing: that following the standard
24 protocol for justifying confidentiality treatment is too burdensome for the government
25 (but not for Plaintiffs) and citing stipulated protective orders as support for its position.

26 Despite this Court's instruction not to cite cases in which the government's
27 proposed protective order was simply stipulated by the parties and signed off by a court
28 without analysis, Defendant did just that. ECF No. 53 at 3-5, 6, 8-10. None of the family

1 separation cases Defendant cited involved a contested protective order. *See, e.g., P.G., et*
 2 *al. v. United States*, No. 4:21-cv-04457-KAW (N.D. Cal. Sep. 7, 2022), ECF No. 58 at 2;
 3 *A.I.L.L., et al. v. Sessions, et al.*, No. 4:19-cv-00481 (D. Ariz. July 15, 2022), ECF No.
 4 105 at 1; *Benitez, et al. v. Miller, et al.*, No. 3:22-cv-00884-JCH (D. Conn. Jan. 05, 2023),
 5 ECF No. 51 at 1.¹ That other plaintiffs in other cases agreed to Defendant's terms
 6 obviously does not bind Plaintiffs in this case. Plaintiffs do not agree to those terms,
 7 which would be tremendously unfair to them.

8 Defendant dedicates a significant portion of its supplemental brief to rearguing that
 9 it should be allowed routinized, mass designation of documents as confidential because
 10 complying with the requirements applicable to every other litigant is too burdensome for
 11 the federal government. ECF No. 53 at 1-5, 7. Defendant makes this argument
 12 notwithstanding this Court's statement at the hearing that if any litigant has the resources
 13 to comply with the review process, it is the government. The government
 14 simultaneously—and nonsensically—argues that for Plaintiffs (an *in forma pauperis*
 15 father and daughter with *pro bono* counsel), assuming the burden of reviewing the
 16 government's documents for confidentiality would be "simple." *Id.* at 6, 10. Defendant
 17 cannot have it both ways.

18 Perhaps most disturbingly, in a further attempt to bolster its burden argument,
 19 Defendant invokes the horrific Robb Elementary School shooting in Uvalde, Texas, a
 20 matter unrelated to this case. *Id.* at 2. The decision to reference this unrelated tragic event
 21 is a shameful attempt to garner sympathy for the government at the expense of children.

22
 23 ¹ Defendant also cited the stipulated protective orders entered in *A.E.S.E. et al. v.*
 24 *United States, et al.*, No. 2:21-cv-00569 (D.N.M.); *A.F.P. et al. v. United States*, No.
 25 1:21-at-00548 (E.D. Cal.); *A.P.F. v. United States*, No. 2:20-cv-00065 (D. Ariz.);
 26 *C.M. v. United States*, No. 2:19-cv-05217 (D. Ariz.); *B.A.D.J. v. United States*, No.
 27 2:21-cv-00215 (D. Ariz.); *E.C.B. v. United States*, No. 2:22-cv-00915 (D. Ariz.);
 28 *E.S.M. v. United States*, No. 4:21-cv-00029 (D. Ariz.); *F.R., et al. v. United States*,
 No. 2:21-cv-00339 (D. Ariz.); *D.J.C.V. et al. v. United States*, No. 1:20-cv-05747
 (S.D.N.Y.); *R.Y.M.R. et al. v. United States*, No. 1:20-cv-23598 (S.D. Fla.); and *Nunez*
Euceda v. United States, No. 2:20-cv-10793 (C.D. Cal.). ECF No. 53 at 2 n.4.

1 The Court gave the government a post-hearing chance to provide relevant case law
2 supporting the imposition of a protective order permitting mass confidentiality
3 designations over objection. The Defendant instead reargued matters already rejected at
4 the hearing.

5 **II. DEFENDANT PROVIDED NO AUTHORITY TO SUPPORT ITS** 6 **POSITION**

7 Defendant cited only two cases involving contested protective orders, but neither
8 supports their argument here. *Juniper Networks, Inc. v. Bahattab*, No. CV 07-1771
9 (PLF)(AK), 2008 WL 11403235 (D.D.C. Nov. 12, 2008), a non-binding case from
10 another Circuit, contains no discussion or analysis by the court. Instead, in a single
11 paragraph, the court briefly recounted the arguments of each side, then summarily
12 concluded that the plaintiff had shown good cause for its request to make confidentiality
13 designations on a partial document basis. *Id.* at *3. Not only does this case lack the
14 discussion the Court sought, but the discovery at issue—complex computer source code
15 related to a patent claim—is significantly different from the discovery in the case at bar—
16 document production that is standard in civil litigation. *Id.*

17 The only other case Defendant cited, again a non-binding case from another
18 Circuit, is equally off point. In *Kristoff-Rampata v. Publix Super Markets, Inc.*, No. 3:15-
19 CV-1324-J-20PDB, 2016 WL 11431488, at *1 (M.D. Fla. Sept. 9, 2016), the plaintiff
20 refused to consider *any* protective order. The defendant company in that labor and
21 employment case then moved the court for a protective order proposing that two discrete
22 categories of business records be designated as confidential. *Id.* at *2. The court applied
23 the good cause standard and determined that the defendant had shown “a particular and
24 specific demonstration of fact as distinguished from stereotyped and conclusory
25 statements supporting [its] need for a protective order.” *Id.* (quotations and citations
26 omitted). The defendant there met this standard by demonstrating that the two categories
27 of documents at issue—confidential internal policies and certain personnel records—
28 were consistently treated as confidential within the defendant organization and qualified

1 as “trade secrets,” the disclosure of which would provide an advantage to the defendant’s
 2 competitors. *Id.* at *3. Here, as Defendant’s supplemental brief makes clear, the
 3 Common Discovery has not been consistently treated as confidential. ECF No. 53 at 6.
 4 Furthermore, any policies or personnel records contained in the Common Discovery are
 5 not “trade secrets” and there are no “competitors” of Defendant that would receive an
 6 advantage as a result of discovery in this case.

7 Defendant has not attempted to make the particularized good cause showing
 8 required by Rule 26, and has failed to provide any authority supporting either (1) the
 9 granting of its proposed protective order permitting the mass designation of
 10 confidentiality over objection, or (2) deviation or variation of the good cause standard.

11 **III. DEFENDANT IS UNABLE TO SHOW GOOD CAUSE FOR MASS** 12 **DESIGNATIONS OF CONFIDENTIALITY**

13 Federal Rule of Civil Procedure 26(c) requires a showing of “good cause” for the
 14 issuance of a contested protective order. Fed. R. Civ. P. 26. The good cause showing
 15 must be specific and particularized to the particular document (or portion of document)
 16 the movant seeks to protect. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130
 17 (9th Cir. 2003); *see also Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1176
 18 (9th Cir. 2006) (requiring a “particularized showing” of good cause for a court to enter a
 19 protective order absent stipulation). Protective orders that permit routinized, mass
 20 designation of confidential material are by their very nature “overinclusive.” *Beckman*
 21 *Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992). Disclosure is favored. *Id.*
 22 at 475.

23 Here, Defendant seeks to avoid making the particularized showing of good cause
 24 required by Rule 26 and Ninth Circuit precedent. Instead, Defendant attempts to shift the
 25 good cause burden to Plaintiffs. ECF No. 53 at 2 (“Plaintiffs have not specified how
 26 [Defendant’s proposed approach] would prejudice their case”). As the party requesting
 27 to make mass confidentiality designations, the Defendant bears the burden of
 28 demonstrating particularized, document-specific good cause for its request—not

1 Plaintiffs. *Foltz*, 331 F.3d at 1130. Defendant’s proposal also seeks to shift the burden
2 of performing a confidentiality review to Plaintiffs, mischaracterizing Plaintiffs’ request
3 that Defendant properly review and designate confidential material as a request for
4 “redesignation.” ECF No. 53 at 10. There is no “redesignation” here. Defendant has not
5 performed the proper “designation” under the Federal Rules and instead seeks to
6 designate *all* Common Discovery as confidential.² ECF No. 40 at 38-40.

7 Both as part of the parties’ Rule 26(f) conference and at the hearing before the
8 Court, Plaintiffs have offered to maintain the confidentiality of Defendant’s productions
9 for an interim period to enable Defendant to conduct the required review and designation
10 required both by this Court’s model protective order and Rule 26. This approach, also
11 suggested by the Court, would merely give Defendant additional time to comply with the
12 review and designation required under the Federal Rules.

13 Defendant has known for more than two years that it would be called upon to
14 produce discovery in family separation cases. ECF No. 53 at 6. It chose to make mass,
15 routinized confidentiality designations in the first case litigated, apparently with that
16 plaintiff’s consent. While that plaintiff and counsel may have been willing to acquiesce,
17 that choice is not binding here. Defendant must be held to the particularized good cause
18 standard and its request for mass confidentially designations without such a showing
19 should be denied.

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23 ² Defendant argues for the first time in its supplemental brief that it has applied
24 “document-by-document confidentiality designations and privilege assertions” to the
25 Common Discovery documents. ECF No. 53 at 1. This is not the case. Defendant
26 has previously admitted in its filings, proposed protective order, and in the hearing
27 before this Court that it did not apply thoughtful document-by-document
28 designations, but rather mass, routinized designations of all Common Discovery
documents as confidential. ECF No. 40 at 11 (stating that the Common Discovery
documents “do not notate the protected portions”); ECF No. 40 at 38 (requesting
“routinized” confidentiality designations to all Common Discovery).

IV. PROPOSED PROTECTIVE ORDER LANGUAGE

Following the April 11, 2023 hearing, the Court directed the parties to meet and confer regarding proposed language “for inclusion in the protective order that would allow Defendant to make blanket confidentiality designations at this time, subject to the requirement that the production be subsequently reviewed by Defendant on a document-by-document basis to determine whether specific documents should be redesignated as not confidential.” ECF No. 52 at 1.

On April 14, 2023, Plaintiffs provided Defendant with the following proposed language for consideration:

The Defendant shall promptly produce the documents identified in its Rule 26 disclosures, including but not limited to, the “Common Discovery” (as defined in footnote 1 of Plaintiff’s Supplemental Memorandum, ECF No. 47). Subsequent to production, Defendant shall undertake a page-by-page review to identify protected portions of those documents in compliance with the Court’s standard protective order as issued in this case. Defendant’s review and identification of the protected portions of all documents produced shall be performed on a rolling basis and completed no later than November 8, 2023.

Plaintiff will maintain the confidentiality of all Defendant produced documents from the time of Defendant’s initial production until the earlier of November 8, 2023, or the completion of Defendant’s review and identification of the portions of the documents that merit confidentiality. Plaintiff further agrees that during this period any portion of the Common Discovery that must be filed or introduced in connection with motion practice or other business of the Court will be filed under seal.

Defendant is not relieved of the obligation timely to produce a privilege log that complies with the Federal Rules of Civil Procedure and the Local Rules of this Court.

The foregoing does not impact or impair Defendant’s obligation to respond to and produce other documents responsive to Plaintiff’s discovery requests immediately and in conformity with the Court’s protective order issued in this case.

1 Declaration of Marina Markarian (“Markarian Decl.”) at ¶ 3; Exhibit 1 to the Markarian
2 Decl. at 4.

3 On April 19, 2023, the parties met to confer regarding the proposed language.
4 Markarian Decl. at ¶ 5. At that conference, Defendant’s counsel stated that she disagreed
5 with the Plaintiffs’ proposal because Defendant does not agree that it should be ordered
6 to conduct a review of its documents. *Id.* Plaintiffs’ counsel explained that the Court
7 instructed that the proposed language should specifically address the period of time in
8 which Defendant will conduct further review of its documents, if so ordered. *Id.*
9 Defendant’s counsel agreed that if Defendant is ordered to conduct a review, the proposed
10 date of November 8, 2023 would be acceptable. *Id.* Plaintiffs’ counsel invited
11 Defendant’s counsel to provide proposed edits to the suggested language or to propose
12 alternative language that satisfied the guidance provided by the Court. *Id.* On April 21,
13 2023, Defendant’s counsel provided the following proposed language:

14 Upon, entry of the Defendant’s proposed protective order, Defendant
15 shall produce the documents identified in its Rule 26 disclosures, including
16 but not limited to, the “Common Discovery” (as defined in footnote 1 of
17 Plaintiff’s Supplemental Memorandum, ECF No. 47). Defendant maintains
18 its current confidentiality designations. In the event Plaintiffs wish to rely
19 upon a document in a court filing, Defendant will promptly review each page
20 and make line-by-line confidentiality designations. All spreadsheets, emails,
and other documents containing third-party personally identifiable
information (PII) who are not government employees are exempt from any
requirement for line-by-line designations.

21 *Id.* at ¶ 6; Exhibit 1 to the Markarian Decl. at 1.

22 Given that Defendant’s proposed language fails to address the subject the Court
23 directed the parties to address, Plaintiffs request that their proposed language be adopted
24 and included in the model protective order.
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1 Dated: April 21, 2023

Respectfully Submitted,

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